88-837

Supreme Court, U.S.
FILED
NOV 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

* *

HERMAN T. MULVEHILL, SR.,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* *

BRIEF OF PETITIONER

* *

J. LOUIS WILKINSON
VIRGINIA A. VINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

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PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein, and Herman T. Mulvehill, Sr., who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Blount County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was without a written opinion.

A copy of the same is submitted in Appendix "A" to this petition.

The denial of the Petitioner's Application for Rehearing by the Court of Criminal Appeals of Alabama was without a written opinion.

A copy of the same is submitted in Appendix "B" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari was without written opinion.

A copy of the same is submitted in Appendix "C" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on September 23, 1988, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in Petitioner's writ is the Fourteenth Amendment to the Constitution of the United States. A copy of this amendment is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

Under indictment filed in the 30th Judicial Circuit of Alabama, on the 6th day of April, 1982, Herman Travis Mulvehill was charged in Count I with knowingly obtaining or exerting unauthorized control over coal, the property of Helen Nice Moss, of the value of $112,000.00, with the intent to deprive the owner of said property in violation of Section 13A-8-3 of the Code of Alabama, and in Count II with knowingly obtaining or exerting unauthorized control over coal, the property of Helen Nice Moss, of the value in excess of $1,000.00, with the intent to deprive the owner of said property, in violation of Section 13A-8-3 of the Code of Alabama.

The case came on for trial on May 21, 1984, on the Defendant's plea of "Not Guilty" and on May 30, 1984, the jury returned a verdict of "Guilty of Theft in the First Degree". On July 3, 1984, the court, after objections to the pre-sentence report, and the appearance of several hundred citizens submitting a petition signed by some 800 citizens in behalf of the Defendant, entered a finding of guilty of theft in the first degree and sentenced the Defendant to serve fifteen years in the State penitentiary. The Defendant was continued on bond pending determination of a Motion for a New Trial. On July 10, 1984, a written Motion for New Trial was filed and on August 3, 1984, a Motion for a Judgment of Aquittal was filed. On September 14, 1984, the court denied the Motion for Judgment of Aquittal and denied the Motion

for New Trial. The Defendant in open court gave notice of appeal and was continued on bond in the amount of $10,000.00.

On the 12th day of April, 1988, the Court of Criminal Appeals of Alabama affirmed by order without opinion.

On the 10th day of May, 1988, the Court of Criminal Appeals denied his Application for Rehearing without opinion, and on the 23rd day of September, 1988, the Supreme Court of Alabama denied the Petition for Writ of Certiorari without opinion.

ARGUMENT

It is the fundamental precept of American Jurisprudence that the prosecution in a criminal case is disallowed to resort to any kind of evidence of a defendant's evil character to establish a probability of his guilt, not because the law invests the defendant with a presumption of good character (Greer vs. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L. ed 469), but because it simply closes the whole matter of character disposition and reputation on the prosecution's case-in-chief. The leading case on the proper use of character evidence by a defendant is still Michelson vs. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L. ed 168 (1948).

Of course, it follows as a necessary corollary to Greer, supra, that the prosecution cannot attack the character of the accused in rebuttal testimony unless he first puts it into evidence.

If the prosecution should flagrantly violate this most basic principal in a state action, then an accused has a valid claim before this Court because of the protection afforded him by the due process clause of the Fourteenth Amendment to the United States Constitution. This fact was implicitly recognized in United States Ex Rel Hurley vs. State of Delaware, 365 F.Supp. 282 (1973).

The "bad man/good man" dichotomy has been categorically rejected by all of the courts once it is recognized. The primary question is always whether or not the prosecution is attempting to prejudice a jury by improperly adducing evidence of

character when it is not properly an issue and thus lacks any probative value and only tends to stigmatize the accused as a "bad man". See United States vs. Fox, 473 F.2d 131 (D.C. Cir. 1972); United States vs. Wright, 489 F.2d 1181 (D.C. Cir. 1973); and United States vs. Giese, 597 F.2d 1170 (9th Cir. 1979).

In Michelson, supra, Mr. Justice Jackson wrote to the effect that the state may not show a defendant's bad name among his neighbors, not because character is irrelevent, but it weighs too much with the jury and over-persuades them to prejudice the accused. To allow such evidence, Mr. Justice Jackson felt it would lead to confusion of the issue, unfair surprise and undue prejudice. Only the defendant may open up this line of inquiry if he chooses to do so.

The instant case was a veritable travesty when measured against the safeguard which this court has, without exception, adhered to.

During the entire trial, the Defendant had never, in any way, opened up the issue of his character. Following the testimony of the accused, the State of Alabama called an FBI agent to the stand and proceeded (over vigorous, repeated, and prompt objections by trial counsel) to question him as to the general reputation of the Defendant in the community where he lived and worked, and for <u>how long</u> he had known that reputation in the community. (R. 1098,1099) To further exacerbate the situation, the trial judge even refused Defendant's trial counsel's request for curative instruction to the jury to the effect that they should completely eliminate from their minds the appearance of an FBI agent in such a capacity.

No testimony on any factual issue was sought from the FBI agent. His presence before the jury as a witness was obviously for the sole and avowed purpose of destroying Defendant's credibility and was unduly prolonged by objectionable and repetitive questioning by the Special Prosecutor. This was allowed to continued by the court, by never produced any evidence from the FBI except the presence of an FBI agent which in itself said the FBI knew bad things about the Defendant and, undoubtedly, indelibly poisoned the minds of the jurors conerning the character and reputation of the Defendant, Herman Mulvehill. The witness was never predicated or qualified to give character or reputation testimony and was excused from the stand without having any testimony whatsoever. The Defendant's character and general reputation was included in each of the many questions asked

by the Special Prosecutor to which Defendant's objections were sustained. The procedure occasioned lengthy questioning and discussions between the court and counsel before the jury, and recesses, before the court finally suggested an end.

The Defendant objected to the procedure and the court should have terminated the inquiry long before it did.

Legal minds know that technically the episode meant nothing was presented that could be considered. But who is naive enough to believe this was the effect on the minds of the jurors. Their minds were poisoned against the Defendant by thoughts that the State brought an agent to tell an FBI story about a criminal on trial before them which they were only prevented from hearing because that "criminal" objected. The Defendant's objections only served to put him in a more unfavorable light. The framing of the questions by the State

suggests to the legal mind a designed unwillingness to ask the simple questions required for a predicate and through the process of "invited objection" repeatedly pose questions which would inject into the minds of the jurors the words "bad reputation" without ever laying a proper predicate for testimony from the witness.

The members of this Court can surely sense and feel an awareness of the rising tension and prejudicial aura that increased with each of the nine times substantially the same questions was asked and the same objection sustained. In the midst of it all the State found requests for recesses necessary to further consider with the court the posture of the situation, all the while counsel for the Defendant was trying to bring it to an end. Meanwhile, the jurors had extended periods with nothing to do but dwell upon what kind of a person the Defendant was that the FBI was here about.

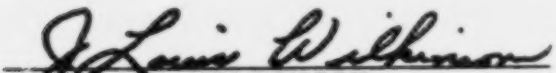
Upon resuming before the jury, the State found it necessary, over Defendant's overruled objections, to repeat the initial questions asking for the FBI agent's name, his employment as an FBI agent, and that he had known the Defendant for several years.

It is not coincidence that the State did not seek to produce any other character or reputation testimony. It is the position of the Defendant that the FBI agent and the manner in which the situation was allowed to develop before the jury created extreme prejudice against the Defendant and planted prejudicial thoughts in the minds of the jurors which were not and could not be removed, that the Defendant was bad. This was accomplished and in no way eradicated by the court. The episode was so damaging and prejudicial that it tainted the entire defense, and requires a reversal and a new trial.

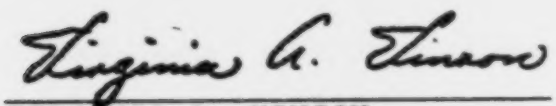
CONCLUSION

The Petitioner submits to this Court that the decision of the Court of Criminal Appeals should be reversed and the case remanded to the trial court.

Respectfully Submitted,



J. LOUIS WILKINSON
Attorney for Petitioner

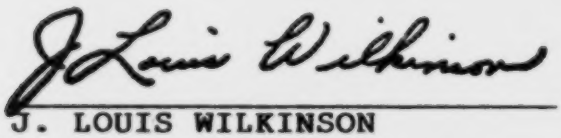


VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed this date by certified mail to the Honorable Don Siegelman, Attorney General, at his office, 11 South Union, Montgomery, Alabama 36130, properly addressed, first class postage prepaid.

DATED this the 18th day of November, 1988.



J. LOUIS WILKINSON
Attorney for Petitioner
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

APPENDIX

APPENDIX A

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 569 Blount Circuit Court
CC82-095

Herman T.Mulvehill, Sr. vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on April 12, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

XXX **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-1

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 569 Blount Circuit Court
CC82-095
Herman T. Mulvehill, Sr vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on May 10, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

_____ **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

XXX Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-2

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101
November 7, 1988

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

Hon. J. Louis Wilkinson
Hon. Virginia A. Vinson
Attorneys at Law
503 Frank Nelson Building
Birmingham, Alabama 35203

Re: 6 Div. 569
Herman T. Mulvehill, Sr. vs. State
Blount Circuit Court No. CC82-095

Dear Sir:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from September 23, 1988, to allow filing a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is notified by the United States Supreme Court of the filing of said petition in that Court.

Yours very truly,

/s/ Mollie Jordan

Clerk

cc: Clerk, Blount Circuit Court
Office of the Attorney General
File

APPENDIX C

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

September 23, 1988

87-1009

EX PARTE: HERMAN T. MULVEHILL, SR.

PETITION FOR WRIT OF CERTIORARI

(Re: Herman T. Mulvehill, Sr. vs. State)

CCA 6/569

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

HOUSTON, J. - TORBERT, CJ., ALMON and BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.

Witness my hand this 23rd day of September, 1988.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX D

a) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.